

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: August 21, 1995

TO: Rosemary Pye, Regional Director, Region 1

FROM: Barry J. Kearney, Acting Associate General Counsel, Division of Advice

SUBJECT: Marriott Hotels, Case 1-CA-32555; Marriott Hotels Case 1-CA-32555

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This Lechmere⁽¹⁾ case was submitted for advice as to whether the Employer violated Section 8(a)(1) by preventing the Union from engaging in secondary consumer boycott handbilling outside the main entrances to its Hotel, or whether there are reasonable alternative means for communicating with patrons of the Hotel.

FACTS

The Employer is a 1200 room Hotel, and is located on the west end of the Copley Place Complex, a multi-level facility containing a shopping mall, restaurants, offices, a movie theater, and an underground garage. The Hotel's main entrances are on the north side and access Huntington Avenue, a well traveled, one-way east-bound street, by an oval shaped private driveway. Dartmouth and Harcourt Streets border the Complex on the east and west, respectively, and the south side of the Complex is bordered by an apartment community. The Prudential Center Mall and other shopping areas, northeast of the Complex, are connected to the second floor of the Complex by a catwalk which crosses Huntington Avenue, just above the Hotel's main entrances. Back Bay Station, which provides public transportation to the downtown area and local airport, is across Dartmouth Street and is connected to the Complex on the east by an underground tunnel.

Vehicles entering the Hotel's main driveway in order to drop off passengers may not exit using that portion of the oval driveway, which has no stop sign or traffic light, but rather must use the part of the driveway shared with vehicles using the underground garage. This shared driveway exits onto Huntington Avenue at a stop light, and vehicles stop at this intersection only if the light is red.

The Employer estimates that forty percent of the Hotel's guests enter through the main Hotel driveway, thirty percent through the shared driveway, and thirty percent through the mall. Additionally, many guests visiting the retail shops within the Prudential Complex Mall or on the streets beyond Huntington Avenue will enter and exit the Hotel through the catwalk which connects the two complexes.

During the winter of 1995, the Hotel began renovations and enlisted the services of a non-union contractor from Washington, D.C. to install carpeting in the renovated units. On January 24, in protest of the Employer's use of a contractor which paid sub-standard wages and benefits, Union representative Marshall and three other Union members began distributing handbills critical of the Employer outside the main entrances of the Hotel. Marshall went into the Hotel, asked to speak with the director of engineering or security, and returned outside. When he later entered the lobby, he introduced himself to a group of security officers reading the handbills; no objections to the handbilling activity were made at that time. However, within five minutes, Hotel security approached the Union members outside the main entrance, informed them that they would have to leave the Hotel's property and, if they did not comply, the police would be called. When the handbillers refused to leave, the police arrived and instructed the handbillers to leave the Hotel premises. The police further informed the Union representatives that handbilling in the street was prohibited and would result in arrest, since such activity posed a danger to public safety. The Union handbillers moved to the public sidewalk near the Hotel's driveway entrance, but since most guests enter the Hotel property by car or taxi, only a small number of handbills were distributed from the sidewalk. Marshall testified that many more handbills were distributed during the 15 or 20 minutes that the Union handbilled in front of the Hotel's main entrances.

The Region has determined that the cost of newspaper advertising in the *Boston Globe* would cost approximately \$10,000 per day for a quarter page ad. However, ads may not be purchased for only one day, since they must be taken out for a minimum number of days. Radio advertisements range from \$8,000 - \$10,000 per day and similarly require the purchase of a minimum number of ads. Television ads are considerably more costly than the mass media forms listed above.

ACTION

We conclude, in agreement with the Region, that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) by preventing the Union from handbilling outside the main entrances to the Employer's Hotel.

In *Leslie Homes*, 316 NLRB No. 29 (Jan. 25, 1995), and *Loehmann's Plaza*, 316 NLRB 316 No. 24 (Jan. 25, 1995), the Board assumed that, at a minimum, *Lechmere* principles applied to primary area standards activity on an employer's property. A property owner may exclude these activities from his property through a non-discriminatory no-solicitation policy, unless there are no reasonable alternative means of accessing the intended audience. *Loehmann's Plaza*, slip op. at 1.

In *Loehmann's Plaza*, the Board applied three traditional factors--effectiveness, safety, and enmeshment of neutrals--to determine whether the union had a reasonable alternative means of communicating with its target audience. Union picketing and handbilling on both sides of a parking lot entrance, near a stop light, was found to be a sufficiently effective means of reaching the intended audience. The Board reasoned that the union could increase the effectiveness of picketing and handbilling efforts by enlarging the print on its signs and displaying additional signs to provide motorists with a more complete view of the union's message. This would allow motorists entering the driveway to see the union's signs, grasp the crux of the message, and establish an awareness of the dispute. In analyzing the safety issue in *Loehmann's Plaza*, the Board found no greater safety risk than that presented in *Lechmere*. The Board further reasoned that despite the effectiveness and safety problems which accompany handbilling, picket signs can alert customers to the nature of the dispute with the primary. If motorists desire further information, they can park their cars and walk to handbillers to receive more information. Additionally, the Board determined that the enmeshment of neutral businesses into the dispute could be remedied by clearly marking picket signs to indicate the target Employer, so that customers would not be confused as to the parties of the dispute.

In *Leslie*, the Board similarly found that the union had not met its burden in showing inaccessibility to the employer's customers. Despite a 45-mile-per-hour speed limit, the public sidewalk bordering the Employer's property was found to be a safe location for picketing. The Board reasoned that cars entering the Employer's property would have to slow down considerably to turn into the development and would therefore have a clear view of any area standards picket signs. The Board further noted that the union could effectively handbill near the exit of the employer's property since home buyers generally take time to contemplate their purchases and most likely would not have made a purchase upon leaving the premises. Moreover, since there was a stop sign at the exit, handbillers could distribute material without the safety risk involved in handbilling to moving vehicles.

The instant case is distinguishable from *Loehmann's Plaza* and *Leslie* since it involves secondary, rather than primary, area standards activity. The secondary nature of the union's activity eliminates the option for lawful picketing and greatly limits the Union's access to alternative non-trespassory means of reaching Hotel guests.

However, in *Oakland Mall*, 316 NLRB No. 173 (April 12, 1995), the Board followed *Leslie* and held that no balancing of employee and employer rights would ever be appropriate where a union seeks a consumer boycott of an employer neutral to its primary dispute with another employer unless the union first demonstrates that there exists no reasonable alternative means of communicating with the neutral's customers other than access to its property. Slip op. at 4. Moreover, the Board stated that at least where the Section 7 right (secondary consumer boycott handbilling) is so attenuated, "the General Counsel must show that the use of mass media (such as newspapers, radio and television) would not be a reasonable alternative means...." *Ibid*. Additionally, the Board has held that the General Counsel has the burden of showing that such factors as safety and ineffectiveness of secondary consumer boycott handbilling warrant a finding that there exists no reasonable method of communicating with employer customers other than access to the property. [\(2\)](#)

In the present case, the Union's effectiveness in reaching Hotel guests without access to the Employer's property is limited since all electronic and national print mass media advertising is extremely expensive. Moreover, given the fact that a large

majority of Employer customers are from out of town, local print media offers only questionable effectiveness in reaching them, even assuming such newspapers are available in the Hotel. ⁽³⁾

Additionally, even if the Union handbilled at all entrances to the Complex, its effectiveness would be limited and diluted by the influx of mall patrons and office workers, and would tend to enmesh neutrals. Handbilling at the exit of the shared driveway is also ineffective since Huntington Avenue is a one-way, east-bound street. Thus, motorists will tend to watch for oncoming traffic to the left, rather than at the handbillers on the public sidewalk to the right, which is the side of the driveway used by exiting vehicles. Moreover, picketing or handbilling the primary remodeling contractor would clearly be ineffective, since its place of business is in Washington, D.C.

Furthermore, handbilling from the public sidewalk entails unreasonable safety hazards. In order to distribute handbills, Union members would have to persuade motorists to stop at one of the driveways accessing Huntington Avenue. The police have already informed the Union of the danger this presents for motorists traveling on Huntington as entering traffic slows or stops to receive handbills. Furthermore, since patrons exiting the shared driveway onto Huntington will only stop if they have a red light, additional hazards arise for handbillers approaching any moving vehicles.

Accordingly, the Employer violated Section 8(a)(1) by preventing the Union from handbilling outside the main entrance to the Hotel. Thus, no reasonable alternative means of accessing the target audience exists, and the consumer boycott appeal, a relatively "attenuated" Section 7 right, nevertheless "is a right that is certainly worthy of protection against substantial impairment." ⁽⁴⁾

B.J.K.

¹ Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992).

² Drexel Co., 316 NLRB No. 168, slip op. at 3-4 (March 31, 1995) (handbilling at driveway entrance was reasonable alternative means where light volume of traffic and rare backups at union's chosen site warrant inference of no traffic hazard at alternative site; overwhelming majority of potential customers would pass by handbillers there; 25 percent of vehicles accepted handbills there; and union continuously handbilled at that location for 13 months). Accord: Loews L'Enfant Plaza Hotel, 316 NLRB No. 169 (March 31, 1995) (union's token attempt at handbilling on public property insufficient to establish no reasonable alternative means to access).

³ Cf. Oakland Mall, supra, (union failed to carry its "heavy" Lechmere burden without any record evidence regarding expense of mass media).

⁴ Jean Country, 291 NLRB 11, 18.